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No. 90-1846

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

GEORGE F. DENTON, Director of Corrections of California, *et al.*,

Petitioners,

v.

MIKE HERNANDEZ,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF RESPONDENT ON THE MERITS

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QUESTION PRESENTED

Petitioners, in their petition for certiorari, framed the "question presented" as follows:

> "Whether a Federal District Court may dismiss a complaint pursuant to 28 U.S. Code section 1915(d) if it finds the complaint wholly fanciful despite the fact that reliance was not made on judicially noticeable facts, i.e. facts of [sic] which are generally known or ascertainable by reference to a readily available, accurate source."

In their brief on the merits, petitioners have slightly modified their articulation of the question presented, which now reads as follows:

> "Whether a Federal Court may dismiss a complaint pursuant to 28 U. S. Code section 1915(d) if it finds the complaint wholly fanciful although that finding was not made on facts judicially noticeable under Rule 201 of the Federal Rules of Evidence."

The Solicitor General on behalf of the United States, as Amicus Curiae supporting petitioners, has framed the question presented as being

> "Whether an action is factually frivolous, and therefore subject to dismissal under 28 U.S.C. 1915(d), only if the factual allegations in the complaint are refutable by judicial notice."

Respondent believes that a more appropriate statement of the question presented should be as follows:

> "Whether any objective standard should be followed by a United States District Court in determining whether the factual allegations in a complaint filed *in forma pauperis* pursuant to 28 U.S.C. § 1915(a) are 'fanciful' or 'baseless,' and therefore 'frivolous,' within the meaning of 28 U.S.C. § 1915(d), and, if so, what that standard should be."

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BRIEF OF RESPONDENT ON THE MERITS

OPINIONS BELOW

The original opinion of Ninth Circuit in *Hernandez* v. *Denton* (*"Hernandez I"*) appears at 861 F.2d 1421 (9th Cir. 1988). On a previous petition for certiorari (No. 88-2034), this Court vacated the Ninth Circuit's decision and remanded this case to that Court for further consideration in light of *Neitzke* v. *Williams*, 490 U.S. 319 (1989). *Denton* v. *Hernandez*, 493 U.S. 801 (1989).

The initial opinion of the Ninth Circuit after remand from this Court, *Hernandez* v. *Denton*, appears at 919

F.2d 573 (9th Cir. 1990). No party petitioned for rehearing, but a Judge of that Court, *sua sponte*, requested that the Court consider the matter *en banc*. Ultimately, that Court decided not to review the matter *en banc*, but the panel slightly modified its initial opinion on remand. The modified opinion as amended on denial of rehearing, *Hernandez* v. *Denton* ("*Hernandez II*"), appears at 929 F.2d 1374 (9th Cir. 1991).

JURISDICTION

This Court has jurisdiction over this proceeding pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

28 U.S.C. § 1915(d): "*The court* may request an attorney to represent any such person unable to employ counsel and *may dismiss the case* if the allegation of poverty is untrue, or *if satisfied that the action is frivolous or malicious.*" (Emphasis added.)

STATEMENT OF THE CASE

This proceeding involves three separate actions filed in the United States District Court for the Eastern District of California under 42 U.S.C. § 1983. The three actions were consolidated on appeal by the United States Court of Appeals for the Ninth Circuit and are before this Court on that same consolidated basis.

1. The First Complaint.

On June 15, 1983, respondent Mike Hernandez ("Hernandez"), a state prisoner, filed a complaint, No. Civ. S-83-645, against various officials and employees of the California Department of Corrections. He named as defendants the Director of the California Department of Corrections, George F. Denton ("Denton"), the Warden of the California State Prison at Folsom, Paul J. Morris ("Morris"), and various John Does who were identified

as either prison guards or inmate classification committee members.

By Order filed September 21, 1983, the District Court permitted him to proceed with No. Civ. S-83-645 *in forma pauperis*, pursuant to 28 U.S.C. § 1915(a). The District Court also inquired into the question of whether the action was frivolous or malicious, within the meaning of 28 U.S.C. § 1915(d). Its Order stated that the Court "cannot determine from the present record whether or not plaintiff's claim is frivolous." Finally, the Order directed Hernandez to use the discovery processes of the Federal Rules of Civil Procedure ("FRCP") in order to obtain document discovery.

In February 1984, Hernandez served a motion for leave to amend his complaint, to add four additional named defendants: Lieutenant Gonzalez, a member of the Folsom Prison classification committee; Lieutenant Rutherford, a member of the Folsom Prison disciplinary committee; one Tomasetti, a civilian employee of the Department of Corrections assigned to the Folsom Prison disciplinary committee; and a Sergeant Lee, a custodial guard at Folsom Prison.

On April 2, 1984, the District Court granted Denton's motion to dismiss under FRCP Rule 12(b)(6), with leave to amend. On June 20, no new amendment having been filed, the District Court dismissed the action, and judgment was entered on June 21. On June 28, Hernandez filed a motion to vacate the judgment of dismissal and to file an amended complaint, substantially renewing his previous amended complaint allegations and alleging mail delays in connection with the filing of his amended complaint. On June 29, the District Court vacated its June 21 judgment of dismissal and reexamined the issue of frivolousness under 28 U.S.C. § 1915(d). Once again, the District Court stated that it "cannot determine from the present record whether or not plaintiff's claim is frivolous."

Hernandez then filed the amended complaint that is one of the subjects of this proceeding. He alleged therein that he had been sexually assaulted by prison guards during the night of July 29-30, 1982, his first night at Folsom Prison. He alleged that the following day he heard guards and inmates taunting and ridiculing him about that incident. He also alleged that, on August 5, during an interview by the Initial Classification Committee for purposes of assignment to housing, custody level and work program, he complained of the incident and presented evidence in support of his complaint. He alleged that no institutional administrative action was taken in response to that complaint. He also alleged that he had been deprived of various procedural due process rights and subjected to various unrelated Eighth Amendment violations.[1]

Denton, Morris, Gonzalez and Tomasetti each filed answers to Hernandez' amended complaint; the summonses directed to Rutherford and Lee were returned unexecuted. Hernandez then initiated discovery on October 4, 1984, by requesting the production of various documents. The defendants responded by asserting that they would permit him to inspect the documents, but would not copy them for him without provision for payment. Some documents were produced, but Hernandez claimed that certain medical records were withheld, and that he was not given an opportunity to make the required copying arrangements.

Hernandez moved to compel production. He admitted that the defendants, as they asserted, had allowed him to examine and make copies of documents contained in his "central file," but he contended that his medical records were not contained in that "central file" and were thus not made available to him. The Court's file does not disclose any counter-declaration to establish that the medical

[1] The Court of Appeals affirmed the District Court's dismissal of Hernandez' complaints as to those procedural due process allegations, and they are not before this Court in this proceeding.

records were in fact contained in the "central file." This discovery dispute was never resolved, because of the Magistrate's *sua sponte* dismissal recommendation and the District Court's order and judgment of dismissal, discussed in Section 5 of this Statement of the Case, *infra*.

2. The Second Complaint.

Hernandez filed another Section 1983 complaint, No. Civ. S-83-1348, on November 8, 1983. Named as defendants were Denton, the Superintendent of the California Medical Facility ("CMF") at Vacaville, Eddie Ylst ("Ylst"), Correctional Lieutenant Hartman ("Hartman"), Correctional Sergeant Anderson ("Anderson"), and Correctional Officer Ingle.

On November 14, 1983, the District Court granted *forma pauperis* status to Hernandez, stating that it could not "determine from the present record whether or not plaintiff's claim is frivolous." All defendants other than Anderson filed answers to Hernandez' complaint on February 17, 1984.

Hernandez thereafter submitted various motions for leave to amend and supplement his complaint, which were either dropped from the calendar or not acted upon because of various procedural notice deficiencies in connection with their filing and/or service. In a proposed amended complaint dated June 19, 1984, Hernandez presented allegations that he had been assaulted and raped by inmates during the night of July 29-30, 1983, the first night after he had been moved by Anderson from Cell L-361, Unit IV of L-3 Wing, to a Third Floor Dorm located in the N-2 Wing at Vacaville. He alleged that he became aware of this incident by finding needle marks, concerning which he made complaint; he also alleged that, on August 6, he was again moved out of the Dorm into a single cell, N-233.

Hernandez accompanied this amended complaint with a sworn declaration from another inmate, one Harold

Pierce. Pierce's declaration asserted that "on the night of July 29, 1983, I witnessed inmate Dushane B-71187 and inmate Milliard B-30802 assault and rape inmate Mike Hernandez as he layed [sic] asleep in Bed 206 in the N-2 Unit Dorm."

Hernandez requested document production similar to his requests in No. Civ. S-83-645, received similar responses thereto, and filed a similar motion to compel, which, because of the Magistrate's dismissal recommendation and the District Court's subsequent order and judgment of dismissal, was never acted upon.

3. Two Intervening Complaints.[2]

On August 20, 1984, Hernandez filed a complaint (No. Civ. S-84-1074), naming as defendants Ylst, Correctional Sergeant Tilton, and Correctional Officers Kohler, Kidwell, King, Blanton, Glover and Arambula. This complaint involved six additional alleged drugging and homosexual rapes occurring between August 12 and November 4, 1983. Hernandez was housed, at that time, in the N Wing, 2d Floor, and at least the first of these incidents allegedly occurred during the First Watch.

On September 17, 1984, Hernandez filed another complaint (No. Civ. S-84-1198) involving three additional alleged incidents, naming as defendants Ylst, Hartman, Correctional Sergeant Ryan, and Correctional Officers

[2] Petitioners have referenced, in addition to the two complaints described in this portion of Hernandez' brief, District Court Civil Nos. S-83-917, S-83-989, S-84-98, S-84-808, S-84-1311 and S-84-1317, all on the basis of Hernandez' reference to those cases in his "third" complaint, No. S-85-84 described hereinafter. There is no indication in the record as to the content of those cases, and, more to the point, those cases were *not considered by the Magistrate* when he made his findings and recommendations for dismissal. The Magistrate made his recommendation expressly, and solely, on the basis of "a reading of all five complaints together." This reference was to the three cases which are the subject of this proceeding plus the two cases which are described herein as the "intervening complaints."

Espinosa, Huddleston, Bowers and Belyea, all of whom were alleged to have been on duty at the Willis (Segregation) Unit of CMF during the 11:00 p.m. to 7:00 a.m. (Second) Watch. Hernandez alleged that Hartman had ordered him into administrative segregation for five days on November 26, 1983, that he was placed in Cell W-116 (a multiple occupant cell), that on November 27 he awoke to discover needle tracks and bruises and other wounds indicative of possible drugging and homosexual rape, that he complained about this to the authorities and was moved to a single cell in the same unit on November 29, that he was released to the general population (Cell P-263) on December 2, that he made complaints and asked for names on December 3 and was immediately given a "rules violation notice" and reordered to administrative segregation, that on December 4 he again awoke to discover needle tracks and other symptoms of homosexual rape, and that a similar sequence of events happened on December 12.

4. The Third Complaint.[3]

Hernandez filed a complaint (No. Civ. S-85-84) on January 21, 1985, alleging that fifteen additional similar incidents involving drugging and sexual assault at CMF had occurred between January 12 and December 10, 1984. Named as defendants were Ylst, Correctional Lieutenant McFadden, and Correctional Officers Smith, McIntyre, Perdoni, Fitzgerald, Price and Tomlinson.[4] As independ-

[3] As indicated in footnote 2, this is actually the fifth complaint filed by Hernandez which the Magistrate considered, but Hernandez did not appeal the District Court's dismissals of the two intervening complaints. It appears that the reason for Hernandez' decision to appeal only the three cases before this Court was that, in these three cases, he had obtained and filed sworn declarations from other inmates which tended to support some of his allegations.

[4] Hernandez alleged the following rapes:

a. During the night of January 12-13, 1984, in Cell P-256, by McIntyre and two inmates, in an incident witnessed by

ent evidence in support of his allegations concerning some of those incidents, Hernandez attached to his complaint copies of two sworn declarations from two other inmates.

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another inmate, one Armando Esquer, whose affidavit to that effect was attached as an exhibit to Hernandez' complaint;

b. During the night of January 26-27, 1884, also by McIntyre and two inmates, and also observed by inmate Esquer and described in his affidavit;

c. During the night of March 22-23, 1984, by unknown persons but believed to be Perdoni, based on finding needle marks on his right wrist on the morning of March 23;

d. During the night of June 28-29, 1984, by unknown persons but believed to be Perdoni, based on finding needle marks on his left arm, right wrist and right ankle on the morning of June 29;

e. On August 4 and August 23, 1984, believed to be by Perdoni, based on needle marks discovery;

f. On September 11, 1984, by Fitzgerald and Price, based on discovery of a needle mark on his left thumb, that mark having been observed by another inmate, one Peter John Goodridge, according to Goodridge's sworn declaration attached as an exhibit to Hernandez' complaint;

g. On September 16, 1984, by Price, based on discovery of needle marks on his left arm and right wrist, that mark also having been observed by inmate Goodridge;

h. On September 21, 1984, shortly before 7:00 a.m., by Perdoni and/or McIntyre, based on awakening feeling ill and nauseous and discovering needle marks on his abdomen, those marks and that condition having been observed by inmate Goodridge;

i. During the night of September 26-27, 1984, by McIntyre, based on awakening to discover needle marks on his left arm and abdomen;

j. On October 8, 1984, by McIntyre, based on awakening to discover a needle mark on his right arm;

k. During the night of October 26-27 or 27-28, 1984, by McIntyre, based on awakening to discover needle marks on his left arm and abdomen;

l. During the night of November 22-23 or 23-24, 1984, by McIntyre, based on awakening to discover three needle marks on his left wrist;

In a declaration dated May 30, 1984, attached as Exhibit H to Hernandez' complaint, inmate Armando Esquer made the following sworn assertions:

> "On January 13, 1984, at approximately 7:30 a.m., I was on my way to the shower, when I saw correctional officer McIntyre, the P-2 Unit Officer, unlock inmate Mike Hernandez's cell door and subsequently saw as two black inmates stepped inside his cell. I did not see Officer McIntyre order these two black inmates out of inmate Mike Hernandez's cell after they stepped inside, even though inmate Mike Hernandez was asleep inside. After about ten minutes, I returned from the shower, and I noticed my friend, Mike Hernandez, was being sexually assaulted by the two black inmates. Officer McIntyre returned to lock inmate Mike Hernandez's cell door after the two black inmates stepped out. I watch [sic] all this activity from the hallway and my cell door.
>
> "On January 27th, 1984, I was again on my way to the shower, when I noticed the same correctional officer as he unlocked inmate Mike Hernandez's cell door, and also saw as two black inmates stepped inside inmate Mike Hernandez's cell. Then I knew right away that both they and Officer McIntyre were up to no good. After this last incident, I became convinced that Officer McIntyre was deliberately unlocking my friend, Mike Hernandez's cell as he laid [sic] asleep, so that these two black inmates could sexually assault him in his cell."

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m. During the early morning hours of December 5, 1984, by Tomlinson, based on awakening to discover needle marks on his left arm;

n. During the early morning hours of December 9, 1984, by McIntyre, based on awakening to discover needle marks on his left wrist and right leg; and

o. During the early morning hours of December 10, 1984, by McIntyre, based on awakening to discover a needle mark on his right arm.

And in a declaration dated November 15, 1984, attached as Exhibit K to Hernandez' complaint, inmate Peter Jon Goodridge made the following sworn assertions:

> "On or about September 10, 1984, the plaintiff showed me point-scratch marks on his left thumb. . . . On or about September 16, 1984, the plaintiff showed me more point-scratch marks on his left arm. . . . On or about September 21, 1984, the plaintiff showed me numerous point-scratches on his abdomen, below his naval. He had been dizzy and semi-conscious the morning of Friday, the 21st day of September 1984, before he left the living room in P-2 Wing, to go out to the prison yard. Plaintiff's speech was impaired and broken and his eyes were not fully open as normal."

Inmate Goodridge then went on to identify the correctional officers who had been on duty in the P-2 wing on those dates.

Hernandez also alleged a number of procedural due process violations, supported in part by sworn declarations of inmates Alexander Cuevas and Carlos Ruelas. The Court of Appeals affirmed the District Court's dismissal of those allegations, and those allegations are not before this Court. See footnote 1, *supra*.

5. Consolidation and Dismissal of the Lawsuits.

On February 1, 1985, the District Court entered a "Related Case Order" pursuant to E.D. Cal. Local Rule 123, relating each of the five cases and assigning them to District Judge Lawrence K. Karlton. As indicated, Hernandez had commenced discovery activities, directed in part toward securing his medical records. On April 17, 1986, however, while Hernandez' motions to compel production of his prison medical file were pending,[5] the

[5] Hernandez had sought various documents from his prison medical file, in an effort to obtain evidence which he contended would have supported his factual allegations concerning the assaults which are the subject of this proceeding.

United States Magistrate, *sua sponte*, filed Findings and Recommendations, recommending that *forma pauperis* status in all of the related cases be granted pursuant to 28 U.S.C. § 1915(a), but also recommending that all five related actions be dismissed as frivolous, pursuant to 28 U.S.C. § 1915(d). The basis for the recommendation is set forth, in its entirety, in the following paragraph of the Magistrate's Order:

> "The court has concluded that the present five actions lack arguable substance in law or fact and should therefore be dismissed. Although each complaint, taken separately, is not necessarily frivolous, a different picture emerges from a reading of all five complaints together. Plaintiff alleges that both guards and inmates, at different institutions, subjected him to sexual assaults. Despite the fact that different defendants are allegedly responsible for each assault, the purported *modus operandi* is identical in every case. Moreover, the attacks occurred only sporadically throughout a three year period. The facts thus appear to be 'wholly fanciful' and justify this court's dismisal of the actions as frivolous."

The Magistrate declined to address Hernandez' motions to compel production of his medical records, finding the motions to be moot in light of the recommendation for dismissal.

On May 2, 1986, Hernandez filed written objections to the Magistrate's recommendation. He asserted that he had presented affirmative independent evidence in support of his complaints, and appended three of the previously filed affidavits from three different inmates in support thereof. On May 5, 1986, however, the District Court issued an order adopting the Magistrate's recommendation and entered judgments of dismissal as to all five cases. Hernandez filed notices of appeal as to the three cases in which he had filed the supporting affidavits from other prisoners.

6. The Appellate Process.

The United States Court of Appeals for the Ninth Circuit reversed the dismissals in part and remanded the cases to the District Court. *Hernandez I, supra*, 861 F.2d 1421 (9th Cir. 1988). Three separate opinions were authored by the panel. The lead opinion affirmed the dismissals on the procedural due process claims, but reversed the dismissals on the drugging and homosexual rape claims, because those dismissals had been "based upon credibility determinations impermissible under section 1915(d)." *Hernandez I, supra*, 861 F.2d at 1427. The holding of the lead opinion was to the effect that "[o]nly if the facts alleged are impossible in light of any judicially noticeable fact may the district court find a complaint 'wholly fanciful' and hence without arguable substance in law or fact." *Id.* at 1426.

Judge Wallace, concurring in the judgment, noted that Hernandez had never been given an opportunity to amend his complaints to avoid various legal deficiencies appearing therein, and that the settled law of the Ninth Circuit was that a *pro se* complaint could not be dismissed without notifying the plaintiff of those deficiencies and allowing leave to amend in light of that notice. He then opined, for that reason, that the dismissals should be vacated to allow Hernandez to amend in light of notice of specific deficiencies. *Id.* at 1427.

The California Attorney General, representing the defendant prison officials and employees, filed a petition for certiorari. Subsequent to *Hernandez I*, this Court rendered its decision in *Neitzke* v. *Williams*, 490 U.S. 319 (1989) ("*Neitzke*"). Accordingly, this Court granted certiorari, vacated the Ninth Circuit's disposition, and remanded the matter of further consideration in light of *Neitzke*. *Denton* v. *Hernandez*, 493 U.S. 801 (1989).

On remand, each of the members of the Ninth Circuit's panel concluded that this Court's decision in *Neitzke* supported, or at least did not cause a change in, his or her previously-expressed views, and that Court reaffirmed its previous disposition in *Hernandez I*. *Hernandez* v. *Denton, supra*, 919 F.2d 573 (9th Cir. 1990). The lead opinion concluded that

> "Under *Neitzke*, we do not believe that a claim can qualify as patently 'delusional' or 'hallucinatory' unless it rests upon facts which the court knows could not have occurred." *Hernandez* v. *Denton, supra*, 919 F.2d at 575, modified in other respects on denial of rehearing *en banc* in *Hernandez II, supra*, 929 F.2d at 1376.

A lengthy dissenting opinion in *Hernandez I*, commencing at page 1427 of 861 F.2d, had set forth the view that Hernandez' various complaints represented nothing more than "the hallucinations of a troubled man"[6] (861 F.2d at 1440), and that no amendment could cure that problem. On remand, the dissenting judge reaffirmed that view, and opined that his position "has been endorsed sub silentio by the [Supreme] court in its remand to us." *Hernandez* v. *Denton, supra*, 919 F.2d at 576, modified on denial of rehearing *en banc* in *Hernandez II, supra*, 929 F.2d at 1377.

After the Ninth Circuit as a whole rejected a *sua sponte* suggestion of one of its members for an *en banc* rehearing, the author of the lead opinion further modified that opinion by striking its prior specific direction that Hernandez amend his claims "to provide more specific factual recitations of the time and place of each of the rapes and conduct on the part of prison officials which violated constitutional standards." The modified opinion, *Hernandez II*, appears at 929 F.2d 1374 (9th Cir. 1990). The Cali-

[6] Although the dissent made several references to Hernandez' place of incarceration as the Atascadero State Hospital, in fact Hernandez is presently incarcerated at Folsom State Prison, and has been for several years. When the instant complaints were filed, he was incarcerated at CMF Vacaville.

fornia Attorney General, on behalf of the defendant prison officials and employees, again petitioned for certiorari, which, on November 4, 1991, this Court granted. The Solicitor General of the United States has filed a brief as amicus curiae supporting petitioners.

SUMMARY OF ARGUMENT

Complaints filed *in forma pauperis* are subject to dismissal as factually "frivolous," pursuant to 28 U.S.C. § 1915(d), only when the factual allegations lack any "arguable basis." District courts, in making such determinations, should be guided by objective standards, and should not be permitted either (a) to make credibility determinations or (b) to engage in weighing the likelihood of success of a paricular complaint. A standard that would preclude Section 1915(d) dismissals unless the allegations are either (a) irrational, or (b) disprovable by objective facts of which judicial notice can be taken, is the appropriate objective standard. Respondent Hernandez' allegations do not permit dismissal under this standard.

Because the statutory term "frivolous" appears in a statute of general applicability rather than one dealing exclusively with prisoner civil rights actions, policy considerations supporting access to the courts call for a narrow construction of the term. The goal of assisting overburdened district courts in controlling their dockets can be advanced by alternative means, implementing Section 1915(d), such as imposing heightened pleading standards in *in forma pauperis* cases, requiring issues-identification procedures and perhaps exhaustion of administrative remedies in prisoner civil rights cases, early use of summary judgment motions, and imposition of vexatious litigant controls.

Although Section 1915(d) and Rule 11, FRCP, address similar goals, they do so by procedures which are so dissimilar as to make inappropriate the application of Rule

11 standards to Section 1915(d) determinations. Moreover, considerations of judicial efficiency as a whole counsel the creation of full and complete records for appellate review of dismissals of complaints.

The deciding vote for the Court of Appeals' reversal of the dismissals of Hernandez' cases was based on the District Court's procedural non-compliance with established Ninth Circuit law requiring that *pro se* plaintiffs be advised of the deficiencies in their pleadings, and given opportunity to remedy those deficiencies. Accordingly, whatever the appropriate standard of review for Section 1915(d) dismissals should be abstractly, that standard should not be applied to Hernandez' cases.

ARGUMENT

I. AN ACTION IS "FRIVOLOUS" ONLY WHEN IT "LACKS AN ARGUABLE BASIS EITHER IN FACT OR IN LAW.

This Court, in *Neitzke*, established the rule to be followed by District Courts in determining whether a complaint should be dismissed as "frivolous" under 28 U.S.C. § 1915(d). It noted that the courts of appeals had generally, and "correctly," adopted close variants of the definition of frivolousness set forth for appeal purposes in *Anders* v. *California*, 386 U.S. 738, 744 (1967) ("[not] arguable on their merits"). *Neitzke*, *supra* at 325. It extended the definition to complaints, involving both factual allegations and legal conclusions, by concluding that a complaint "is frivolous where it lacks an arguable basis either in law or in fact." *Ibid.* It concluded that the term "frivolous" "embraces . . . the fanciful factual allegation." *Ibid.* The *Neitzke* standard, as thus articulated, virtually tracked the standard which had previously existed in the Ninth Circuit under *Franklin* v. *Murphy*, 745 F.2d 1221, 1227-1228 (9th Cir. 1984), a standard which the Ninth Circuit had expressly applied in *Hernandez I*, and which it again applied under the authority of *Nietzke* in *Hernandez II*.

Neitzke reaffirmed this Court's commitment to "Congress' overarching goal in enacting the *in forma pauperis* statute: 'to assure equality of consideration for all litigants.'" *Neitzke*, *supra* at 329, citing *Coppedge* v. *United States*, 369 U.S. 438, 447 (1962). It referred, as examples of the types of unarguable claims which could properly be dismissed as frivolous, to those "describing fantastic or delusional scenarios," and noted that District Court were "all too familiar" with such types of claims. *Neitzke*, *supra* at 328. As hereinafter indicated, Hernandez views this language as merely articulating, in different words, the proposition that complaints postulating *irrational* scenarios may be dismissed as frivolous.[7]

Neitzke clearly establishes that Rule 12(b)(6) dismissals differ in kind from Section 1915(d) dismissals, and that a given complaint may be insufficient under Rule 12(b)(6) and yet not be frivolous within the meaning of Section 1915(d). The present case is the converse of that equation: can a complaint be deemed to be factually frivolous if it *does* pass muster under Rule 12(b)(6)? Hernandez asserts that, unless the facts alleged are either irrational or otherwise objectively disprovable by judicially noticeable facts, it cannot.

[7] Some circuits articulated a "realistic chance of ultimate success on the merits" standard prior to *Neitzke*, and have continued to refer to that standard after *Neitzke*. Hernandez believes that the "realistic chance of success" standard is incompatible with the "arguable basis in fact" standard which *Neitzke* prescribes. Other circuits have rejected the "realistic chance of success" standard. See, e.g., *Malone* v. *Colyer*, 710 F.2d 258, 261 (6th Cir. 1983), and *Boyce* v. *Alizaduh*, 595 F.2d 948, 952 (4th Cir. 1979).

II. DISTRICT COURTS SHOULD FOLLOW OBJECTIVE STANDARDS IN DETERMINING THAT A PARTICULAR CASE LACKS AN "ARGUABLE BASIS IN FACT."

This proceeding requires the Court to consider the question whether any objective standard must be followed by District Courts in determining claims to be lacking of an "arguable basis" in fact, and if so, what that standard is.[8] This Court has already counseled against "a restrictive interpretation of [the *in forma pauperis*] statute". *Adkins* v. *E. I. DuPont De Nemours & Co.*, 335 U.S. 331, 340 (1948). Section 1915 is a remedial statute and thus should be liberally construed. Cf. *Peyton* v. *Rowe*, 391 U.S. 54, 65 (1968). Hernandez submits that an objective standard is required; indeed, this Court has previously held that, for appeal purposes under the *forma pauperis* statute, the "good faith" requirement for district court certification of an appeal "must be judged by an objective standard." *Coppedge*, *supra* at 445. Hernandez perceives no reason to distinguish, in requiring an objective standard, between trial court "good faith" determinations for appeal purposes and trial court "frivolousness" determinations for trial court purposes.

"Adequate, effective and meaningful" access to the courts is a fundamental right founded upon the due process clause of the Fifth and Fourteenth Amendments. *Bounds* v. *Smith*, 430 U.S. 817, 822-823 (1977). That right "assures that no person will be denied the opportunity to present to the judiciary allegations concerning

[8] Contrary to petitioners' apparent view that district courts should have complete discretion under Section 1915(d), the United States as amicus curiae and Hernandez appear to agree on the desirability of applying an objective standard to district court action under the statute; the United States and Hernandez differ only on the question of what that objective standard should be.

violations of fundamental constitutional rights." *Wolff* v. *McDonnell*, 418 U.S. 539, 579 (1974). Access to the court is not "adequate, effective and meaningful" if complaints can be dismissed as factually frivolous, simply because the facts presented are highly unlikely. If judgments of dismissal are permissible under Section 1915(d) on the basis of credibility determinations made in the absence of evidentiary hearings, poor people[9] will have been placed into a position whereby their right of access to the courts is significantly different from that right of access available to paying plaintiffs.

III. ONE SUCH OBJECTIVE STANDARD INVOLVES A DISTINCTION BETWEEN FACTUAL ALLEGATIONS THAT ARE IRRATIONAL VS. FACTUAL ALLEGATIONS THAT ARE MERELY UNLIKELY OR UNCREDIBLE.

While admitting that "no single word or group of words provide a precise formula that will dispose of every case," *Coppedge* v. *United States*, *supra* at 441, Hernandez believes that this Court has already adopted a "rational-credible" distinction with regard to the *forma pauperis* statute, by holding that a pauper appellant is entitled to be heard "if he makes a *rational* argument on the law or facts." (Emphasis added.) *Coppedge*, *supra* at 448.

Consistent with this view, in situations involving the filing of complaints *in forma pauperis*, the Sixth Circuit has articulated an objective standard (rational vs. credible) which Hernandez believes to be appropriate in determining whether a factual claim has an "arguable basis." The Ninth Circuit followed that standard in *Hernandez I* and *Hernandez II*, albeit in different language. In *Lawler* v. *Marshall*, 898 F.2d 1196, 1199 (6th Cir. 1990), a post-*Neitzke* case not involving significant

[9] The quesion presented to this Court is not limited to the context of prisoner civil rights litigation. See Section IV-A of this brief, *infra*.

analytical differences from Hernandez' case, the Sixth Circuit opined that

> "The standard is not whether or not the district court believes the prisoner—rather, it is whether the facts are rational. The defendants argue that because Lawler claims he saw the guards laughing in the reflection off his nail clipper, the claim is not rational. While Lawler's assertion strains credulity, it is not based on a delusional assertion of facts."

The Sixth Circuit referred, as examples of what it meant by delusional facts, to "prisoner petitions asserting that Robin Hood and his Merry Men deprived prisoners of their access to mail or that a genie granted a warden's wish to deny prisoners any access to legal texts." *Ibid.*[10] The Sixth Circuit's example is not materially different from that argued by Hernandez to the Ninth Circuit, and to this Court on petitioners' prior certiorari petition:

> "This is not a case where a prisoner is alleging that 'little green men from Mars' have taken over his mind by radio waves, and that prison authorities are responsible therefor! Allegations of that type would no doubt qualify for inclusion under the 'fantastic or delusional scenarios' language of *Neitzke*."

The Ninth Circuit's imposition of a "judicial notice" standard as one basis[11] for judging the frivolousness of

[10] But see *White* v. *White*, 886 F.2d 721, 724 (4th Cir. 1989) (a frivolousness finding need not require that the court be faced with prisoner allegations that he is "appealing a criminal conviction returned on the planet Saturn").

[11] Both petitioners and the United States as amicus curiae take the Court of Appeals to task for failing to discuss *other* bases for determining factual frivolousness. As one example, however, *forma pauperis* complaints might be dismissed for factual frivolousness where a set of alleged facts has been previously and unsuccessfully asserted in litigation by a party involved in a specific event but not in privity with a subsequent *forma pauperis* plaintiff suing on the same event, thus precluding application of *res judicata* or collateral estoppel concepts.

forma pauperis factual allegations is merely another way of semantically articulating the "rational vs. credible" distinction argued here by Hernandez. Rule 201(b) of the Federal Rules of Evidence permits judicial notice of facts which are "not subject to reasonable dispute." It specifies that the absence of a "reasonable dispute" as to a particular fact is to be determined on the basis that

> "it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."

Assertions of facts that are "irrational" fall within the negative scope of this definition; assertions of facts that are merely "unlikely" or "uncredible" do not.[12] This distinction is perfectly consistent with petitioners' references to district court dismissals of allegations that a plaintiff was the prophet Muhammed, or that another plaintiff was in communication with the Devil. Petitioners' Brief on the Merits ["petitioners' brief"], pages 16-17.

Contrary to petitioners' assertion (petitioners' brief, pages 11-13, footnote 4), the Ninth Circuit's judicial notice standard, which effectively distinguishes between irrational and merely unlikely or uncredible allegations, is not out of step with the standards applied by other circuits. Although many cases simply parrot the "arguable basis" standard and do not meet the question of what constitutes an "arguable basis in fact," some circuits have addressed the problem.

For example, in *Battle* v. *Central State Hospital*, 898 F.2d 126 (11th Cir. 1990), the Eleventh Circuit concluded that this Court's affirmance of the Seventh Circuit's decision in *Neitzke* constituted the adoption of "a more restrictive standard in the area of permissible § 1915(d) dismissals." *Id.* at 128. That Court concluded that, while Battle's filings gave evidence of mental illness,[13] the trial court's Section 1915(d) dismissal must be reversed because the claim "appear[ed] to have some *rational* basis in fact and consequently . . . [was] not clearly baseless."[14] *Id.* at 130. (Emphasis added.)

In this regard, the *Battle* Court also noted that this Court's *Neitzke* affirmance was of a Seventh Circuit opinion which articulated a "no *rational* argument in law or facts" standard. *Williams* v. *Faulkner*, 837 F.2d 304, 306 (7th Cir. 1988), affirmed sub. nom. *Neitzke* v. *Williams*, *supra*. The Seventh Circuit's balancing of interests between preserving meaningful access to the courts and eliminating non-meritorious lawsuits resulted in a standard permits Section 1915(d) dismissals "only if the petitioner can make no *rational* argument in law or facts." *Jones* v. *Morris*, 777 F.2d 1277, 1279-1280 (7th Cir. 1985).[15] (Emphasis added.)

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[12] A court can take judicial notice that alleged facts that are irrational did not occur, whereas it cannot take judicial notice that alleged facts that are merely uncredible or unlikely did not actually occur.

[13] A standard which would permit Section 1915(d) dismissals based on credibility determinations would seem to preclude mentally ill prisoners or patients as a class from brining actions *in forma pauperis*, because by definition the credibility of such persons is suspect. It is for this reason that consideration should be given to the rationality of the allegations themselves and not simply to the rationality of the person bringing them.

[14] The Court appears to have been opining that a standard articulated in *Harris* v. *Menendez*, 817 F.2d 737, 740-741 (11th Cir. 1987) ["realistic chances of ultimate success are slight"], to support Section 1915(d) dismissals was no longer good law after *Neitzke*. Statistically, *all* prisoner cases can be said to have "realistically slight" chances of success.

[15] See also *Dase* v. *Solem*, 858 F.2d 385, 387 (8th Cir. 1988) [no dismissal where prisoner sets forth "a legally and factually *rational* argument" (emphasis added)]. And, as indicated, in a post-*Neitzke* decision the Sixth Circuit has expressly adopted the "rational vs.

III. APPLICATION OF THE "ARGUABLE BASIS" STANDARD TO HERNANDEZ' ALLEGATIONS.

The following facts in the record in this proceeding [16] are important in determining whether the Section 1915(d) statutory term "frivolous" should be applied to bar Hernandez' particular complaints:

1. At least some of Hernandez' factual allegations, against the guards who unlocked his cell door and either committed the alleged rapes or permitted them to occur by admitting other persons into his cell for that purpose, either were or could be amended to be sufficient to state claims against those persons sufficient to withstand a Rule 12(b)(6) dismissal;

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credible" distinction. *Lawler* v. *Marshall*, *supra*, 898 F.2d 1196, 1199 (6th Cir. 1990).

[16] Petitioners have pointed to the existence of a significant number of matters which either were not in the files of the District Court at all at the time Hernandez' complaints were dismissed, or were not considered by the Magistrate and the District Court in dismissing those complaints or by the Court of Appeals in vacating that dismissal. It would be inappropriate for this Court, in establishing an appropriate standard on the basis of which district courts can dismiss cases under Section 1915(d), to review the propriety of the dismissals of these cases on the basis of matters never presented to the District Court or the Court of Appeals. See *Boag* v. *MacDougall*, 454 U.S. 364, 365 n.* (1982). Specifically:

a. Neither the District Court nor the Court of Appeals considered the matter described in footnote 1 of petitioners' brief. And at least two of the cases cited in footnote 1 involved appeals in which Hernandez *prevailed* in the Ninth Circuit.

b. Although the matters described in footnote 2 of petitioners' brief were referenced in Hernandez' "third" complaint, neither the Magistrate nor the District Court considered them in dismissing the instant complaints.

c. The matter described in footnotes 3 and 7 of petitioners' brief was not considered either by the District Court or by the Court of Appeals. Moreover, the Ninth Circuit found, in *Hernandez* v. *Ylst*, 930 F.2d 714 (9th Cir. 1991), that the description by Hernandez to his original trial judge of similar rapes in the San Luis Obispo County Jail was *not* sufficiently irrational to require a competency hearing, much less a finding of incompetency.

2. Hernandez was never given notice of those of his factual allegations against other defendants which were legally or factually insufficient to withstand a Rule 12(b)(6) motion, and the reasons therefor, so that he could attempt to amend to cure those deficiencies, in accordance with previously existing Ninth Circuit practice and as suggested by the concurring judge below; [17]

3. Hernandez presented independent support from other inmates for some of his factual allegations, including in one instance a specific identification of activities of a particular guard, and in another instance specific identification of inmates assaulting Hernandez in a prison dorm, and in yet another instance corroboration of the existence of marks on Hernandez' body and of Hernandez' demeanor consistent with Hernandez' allegations of having been drugged;

4. Hernandez, in most instances, specifically identified the guards on shift duty in the particular prison wing or area at the particular time of the alleged assaults;

5. In two of the three cases before this Court, the defendants had filed answers to Hernandez' complaints, and document discovery proceedings had been initiated,[18]

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[17] *Pro se* prisoner complaints are judged by more lenient standards than are formal pleadings prepared by lawyers. *Haines* v. *Kerner*, 404 U.S. 519, 520 (1972).

[18] If Hernandez' claims can properly be dismissed as "fanciful," such a result would occur (a) in the face of the District Court's inability to make such a determination on the basis of the face of his individual pleadings alone, but (b) also in the face of the District Court's failure to allow him to attempt to secure objective evidence which might tend to further support those claims. Moreover, this factor is relevant to the argument of the United States that a Rule 11-type "duty of inquiry" is required of *forma pauperis* plaintiffs. See Section IV-C of this brief, *infra*. The record here discloses that Hernandez in fact (a) did obtain affidavits from other inmates supporting, in part, his allegations, and (b) did attempt unsuccessfully to obtain records from his medical file to support those allegations. Given that the Rule 11 "duty of inquiry" requires

thus bringing the adversary system into play; [19]

6. No judicial officer at any level has ever determined, after an evidentiary hearing, that Hernandez' allegations are factually untrue; [20] and

7. Hernandez' factual alegations are not inherently impossible, and therefore are not irrational.

There is nothing "wholly fanciful," or "fantastic or delusional," about the propositions that drugs exist, or that homosexual activity occurs, or that inmate-guard relationships are less than amicable, in prison settings. Prisons house the strong and the weak; the weak are subject to being preyed upon by the strong, and there is nothing inherently illogical about the proposition that forced homosexual activity occurs on an on-going basis.[21]

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only what is "reasonable" under the circumstances, the instant record does not evidence a failure of Hernandez in that regard.

[19] It is the rule of some circuits that Section 1915(d) dismissals are not appropriate after a complaint has been served and the defendants have answered. See, e.g., *Roman* v. *Jeffes*, 904 F.2d 192, 195-196 (3d Cir. 1990), and *Williams* v. *White*, 897 F.2d 942, 943-944 (8th Cir. 1990).

[20] For this reason, this Court's construction of its own Rule 39.8, involving denial of leave to proceed with certiorari petitions *in forma pauperis*, should not control this case. Questions involving review of cases where at least two judicial determinations (one district court and one court of appeals) on the merits have been made are qualitatively different from questions involving cases where no judicial officer has ever addressed the merits of the case.

[21] The Magistrate and the dissenting Court of Appeals judge, while reaching a common conclusion, appear to have viewed this subject from different perspectives. The Magistrate apparently discounted Hernandez' allegations because "the attacks occurred only sporadically throughout a three year period." The dissenting Court of Appeals judge, however, gave great emphasis to the number of alleged attacks in concluding that Hernandez' allegations were "sheer and utter nonsense" and therefore went "beyond the pale of

Although allegations that that type of activity was perpetrated by, or with the knowing asisstance of, prison guards are unusual, the history of correctional institutions precludes one from fairly concluding that such activity could *never* occur.

IV. POLICY CONSIDERATIONS.

At least five policy considerations weigh in favor of a narrow definition of the statutory term "frivolous" within the meaning of Section 1915(d). First, the clear Congressional purpose of the statute was to allow indigents to use the courts. Second, common sense and reality dictate that the courts must be sensitive to the great potential for abuses in the prisons. Third, most *forma pauperis* plaintiffs lack experience and skill in legal pleading, and therefore often present awkward and confusing complaints. Fourth, *some* claims are in fact meritorious, but might be prematurely dismissed under an overly broad exercise of Section 1915(d) discretion.[22] Fifth, a narrow definition would obviate disparity of treatment based upon economic circumstances.

A number of policy arguments have been advanced in favor of granting to district courts broader discretion to

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frivolity." *Hernandez I*, *supra* at 1438; and cf. *Hernandez II*, *supra* at 1378.

Petitioners assert that the Court of Appeals concluded either (a) that an allegation of many rapes is more credible than an allegation of just one, or (b) that just because "an absurd number of incidents are alleged," there is no means of determining that at least *one* of those incidents did not occur. Petitioners argue that "[t]his position eschews common sense and . . . experience . . . ." Petitioners' brief, footnote 8. To the contrary, however, there is nothing nonsensical about the proposition that if a guard felt sufficiently safe to engage in the alleged activity at all, he would feel sufficiently safe to engage in it on an ongoing basis.

[22] "Even the most dedicated trial judges are bound to overlook meritorious cases without the benefit of an adversarial presentation." *Bounds* v. *Smith*, *supra*, 430 U.S. 817, 826 (1977).

issue Section 1915(d) dismissals than would be permitted under the Ninth Circuit's standard articulated in these cases. This Court in *Neitzke*, *supra*, at 326, however, warned that its "role in appraising petitiners' reading of § 1915(d) is not to make policy, but to interpret a statute." Moreover, while some of those policy arguments are not without merit, it would be premature to apply them to the instant case. And in other instances, the arguments are outweighed by countervailing considerations.

A. Statutory Construction Considerations.

The facts of this particular matter involve allegations by a state prisoner. The question presented to this Court, however, is not limited to prisoner civil rights litigation. To the contrary, it involves the construction of a statute of general applicability to poor persons. A holding that would permit district courts to dismiss cases based on an evaluation either of the credibility of the plaintiff or of the plaintiff's reasonable chances of success would permit dismissals, without evidentiary or procedural protections, of such matters as securities fraud complaints brought by investors defrauded of their life's savings, RICO complaints by small businessmen put out of business by sharp practices of others, consumer litigation involving defective products, complaints involving improper administrative activities by governmental agencies, etc. Although the judicial system faces admitted burdens and problems from the filing of thousands of meritless prisoner civil rights actions, the Court should not attempt to fashion a remedy for *those* burdens and problems in a manner which would adversely impact the ability of poor persons in general to claim entitlement to judicial relief for wrongs allegedly done to them.

B. Pleading and Procedure Remedies.

The increasing number of prisoner civil rights actions is an admitted burden on the judicial system; that is not

a subject for debate.[23] Hernandez submits, however, that the solution to that burden is not to establish a rule of general application which would deny poor persons access to the system *in the first instance*. The courts have several remedies which are appropriate to address those cases in which the likelihood of success is small. This Court has authorized district courts to exercise their inherent authority, notwithstanding the absence of statutory or rule authority therefor, to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." *Link* v. *Wabash R. Co.*, 370 U.S. 626 (1962) (dismissal of case for lack of prosecution); and *cf. Chambers* v. *NASCO, Inc.*, —— U.S. ——, 111 S.Ct. —, 115 L.Ed.2d 27, 44 (1991). Resort to procedures short of dismissals of cases based solely on disbelief of unlikely allegations should be first attempted.

1. *Fact Pleading.*

Some of the circuits have adopted a "heightened pleading standard," peculiar to civil rights actions, which requires plaintiffs to allege specific facts in support of their complaints where subjective motivation or intent is an element of the claim.[24] This Court, however, has never articulated such a rule, which would seemingly contradict the plain language of Rules 8(a)(2) and 9(b), FRCP.

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[23] The reason or reasons for that increase, on the other hand, can be a subject of substantial disagreement. It is a fact, however, that prison population has greatly increased over the last few years, and it appears that that trend is likely to continue. More prisoners mean more prisoner litigation.

[24] The Ninth Circuit had not expressly adopted such a standard until its decision in *Branch* v. *Tunnell*, 937 F.2d 1382, 1386 (9th Cir. 1991), after its decisions in both *Hernandez I* and *Hernandez II*. Indeed, the modification of the lead opinion in *Hernandez II* on denial of *en banc* consideration, deleting language which would have directed Hernandez to amend his complaints on remand, may reasonably be viewed as an effort to avoid prejudging the issue in a case where that issue was directly involved.

Although such a question was before this Court in *Siegert* v. *Gilley*, —— U.S. ——, 111 S.Ct. 1789, 114 L.Ed.2d 277 (1991), this Court declined to reach the question. A heightened pleading standard established by this Court, applied to *forma pauperis* complaints as a method of implementing Section 1915(d), would be an appropriate step addressing the balance between maintenance of the constitutional right of access to the courts and the practical problems of burdensome but ultimately unproductive complaints by indigents.[25] *This is the practical result of the Ninth Circuit's decision.* The second vote for reversal of the District Court, that of concurring Judge Wallace, was expressly based on the proposition that Hernandez should be permitted to amend to articulate specific facts as to specific defendants of specific unconstitutional activity, i.e., an amendment under a heightened pleading standard.

2. *Issues-Identification Requirements.*

Some circuits have adopted procedural requirements to assist them in appropriately dealing with prisoner civil rights complaints. The Fifth Circuit has adopted a procedure called a "Spears hearing," [*Spears* v. *McCotter*, 766 F.2d 179 (5th Cir. 1985)], in the nature of an evidentiary proceeding analogous to a motion for a more definite statement under Rule 12(e), FRCP. The purpose of the hearing is (a) to assure that indigents have meaningful access to the federal courts, while at the same time (b) "winnow[ing] out the wheat from the unusual amount of chaff" involved in *pro se* litigation. *Wilson* v. *Barrientos*, 926 F.2d 480, 482 (5th Cir. 1991). Similarly,

[25] While the greatest effects of a heightened pleading would be likely to be experienced in the area of prisoner litigation, the imposition of such a requirement as a method of enabling district courts to "satisfy" themselves concerning lack of factual frivolousness should logically extend to all *forma pauperis* complaints. This does not seem too great an imposition to require of plaintiffs who are seeking the benefits of the Government's fisc.

the Tenth Circuit employs a so-called "Martinez report" procedure [*Martinez* v. *Aaron*, 570 F.2d 317 (10th Cir. 1978)], which permits district courts to require the submission of administrative reports, and to use those reports in Section 1915(d) evaluations, "as a means of determining jurisdiction, sorting and clarifying issues and otherwise elucidating the often obscure complaints filed by *pro se* plaintiffs." *El'Amin* v. *Pearce*, 750 F.2d 829, 832 (10th Cir. 1984). The Ninth Circuit does not now employ either of these procedures, but Judge Wallace's concurring opinion in *Hernandez I* and *Hernandez II* seems to counsel the same types of considerations.

Similarly, the states themselves have an appropriate, albeit voluntary, role to play in assisting the judiciary in this regard, under the Civil Rights of Institutionalized Persons Act, 42 U.S.C. § 1997 *et seq.*, and see in particular 42 U.S.C. § 1997e(b). The Ninth Circuit does not now employ this procedure with regard to California prisoners because California has not elected to establish the administrative remedies encouraged by the Act. The *Spears* and *Martinez* procedures, and the remand in this case, however, address the same considerations. See also *McCarthy* v. *Maddigan*, 914 F.2d 1411 (10th Cir. 1990), cert. granted —— U.S. ——, 111 S. Ct. 1618, 113 L.Ed.2d 716 (1991).

Adoption of procedural requirements of this type, either instead of or together with imposition of a heightened pleading requirement standard, would be consistent with, and an appropriate construction of, this Court's *Neitzke* language pertaining to 'pierc[ing] the veil" of the factual allegations presented by indigents, whether they be prisoners or not. Such adoption would also address the "short sabbatical in the nearest courthouse" concern,[26] by enabling district courts to review *forma pauperis* prisoner complaints in a way which would enab'e them, on the

[26] See *Cruz* v. *Beto*, 405 U.S. 319, 327 (1972) (Rehnquist, J., dissenting).

basis of objective standards, to dismiss the "fanciful" ones prior to trial, pursuant to an informed exercise of the "rational vs. credible" distinction proposed here as a standard for interpreting Section 1915(d).

3. *Summary Judgment Procedures.*

Not every case that survives a Section 1915(d) dismissal at its outset will necessarily survive to trial. This Court's interpretation of Rule 56, FRCP, permitting summary judgment in cases where no *genuine* issue of material fact exists, can inform the role of district courts in *forma pauperis* actions. The term "genuine issue" means an issue "[w]here the record taken as a whole could not lead a *rational* trier of fact to find for the nonmoving party." *Matsushita Electric Industrial Co., Ltd.* v. *Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). (Emphasis added.) And if the factual context renders a party's claim implausible, that party must come forward with more persuasive evidence to support its claim than would otherwise be necessary. *Ibid.* The proper inquiry, however, is whether *the evidence* presents a sufficient disagreement to require submission to a jury.[27] Here, although petitioners filed answers to two of the complaints in the three subject cases, they have never submitted affidavits denying the allegations against them and seeking to force Hernandez to present the required degree of contrary evidence.

It might be argued that Rule 56(e) does not require a moving defendant to present *any* affidavits or other evidence negating a prisoner's complaint, see *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 323 (1986), and that Section 1915(d) should be treated in like manner. Such an argument, however, would ignore the fact that, unlike the situation in a Section 1915(d) dismissal, the responding party to such a motion would always have the opportunity to present its own evidence in opposition to such a motion, even if the moving party did not support its motion by affidavits or other evidence.

[27] It is interesting to note the similarity between this Court's reference, in *Neitzke*, to "pierc[ing] the veil of the complaint's factual allegations" and the Advisory Committee's Note to the 1963 Amendment to Rule 56(e), to the effect that the purpose of summary judgment is to "pierce the pleadings and to assess the proof". *Matsushita*, *supra* at 587.

Thus, a judicious use of FRCP motions will enable the great majority of cases postulating unlikely facts to be resolved in a manner short of trial, but under procedures which do not arbitrarily distinguish between paying plaintiffs and *forma pauperis* plaintiffs in a manner which calls into question (a) constitutional issues of access to the courts and (b) statutory issues of construction and congressional intent.

4. *Vexatious Litigant Procedures.*

A distinction should be drawn between plaintiffs who file many complaints, which have uniformly ultimately been found to be meritless, and plaintiffs who file only one or two complaints which may, individually, postulate claims of a highly unlikely nature. The courts, including this Court, have tended to focus upon the "repeater" as the type of plaintiff against whom frivolousness dismissals or denials are appropriate. See, e.g., *Zatko* v. *California* (No. 91-5052, November 4, 1991). But Section 1915(d) authorizes dismissals of *forma pauperis* complaints for two separate and distinct reasons: frivolousness and malice. The courts have tended not to address the "malice" prong of the statute. Repeaters, however, would seem more appropriately to fall within that prong than within the "frivolous" prong. This Court itself teaches, in *Neitzke*, *supra* at 328-329, that claims subject to dismissal under Rule 12(b)(6) are not necessarily frivolous in nature. An ultimate finding of lack of merit does not mean that a complaint is frivolous. And an ultimate finding of lack of merit as to many complaints by a single prisoner does not establish that any of those complaints, individually, were frivolous.

The "repeater" plaintiff, however, may be subject to appropriate control under the "malice" prong of Section 1915(d), which would eliminate the necessity of district courts having to inquire into the types of factual and credibility questions which Hernandez believes to be improper. Some courts, by local rule, have established procedures protecting against vexatious litigants. For example, the Eastern District of California, from which these cases have arisen, has by local rule incorporated California's vexatious litigant statute. E.D. Cal. Local Rule 151(b), incorporating Section 391 *et seq.* of the California Code of Civil Procedure.[28] While vexatious litigant statutes are directed toward the furnishing of security, the concept that they address is relevant to the question of malice within the meaning of Section 1915(d).

If this analysis were to prevail, the Court would look not at the factual allegations of Hernandez' complaints, but at his procedural history in light of the factors described in footnote 28 of this brief. That procedural history would show that, at the time these cases were dismissed, (a) Hernandez had filed two cases which had been dismissed, (b) although he had more than five other cases pending, there was no showing that he had *unjustifiably* failed to bring them to trial within two years, and

[28] At the time these cases were before the District Court, a "vexatious litigant" was defined in California as one who (a) had unsuccessfully prosecuted, *in propria personna*, five actions within a seven-year period, (b) had unjustifiably permitted five such actions to remain pending at least two years without bringing them to trial, or (c) had repeatedly relitigated or attempted to relitigate, *in propria personna*, the same claims determined by a prior action. The definition was broadened in 1990 to include (d) the repeated filing of unmeritorious motions, pleadings or other papers, and (e) the status of having previously been declared by another court to be a vexatious litigant. The common thread among all of these definitions is that either there had been a previous judicial determination of lack of merit in the prior cases or the plaintiff had *unjustifiably* failed to bring them to trial or hearing within two years.

(c) none of the cases that he had filed had been decided against him on the factual merits.[29] If the District Court's local rule were to serve as an appropriate measure of its discretion to determine "malice" within the meaning of Section 1915(d), Hernandez' cases would not have been dismissed on that ground.

C. Rule 11, FRCP.

The United States as amicus curiae, like Hernandez, argues that an objective standard should govern the actions of district courts under Section 1915(d). The United States argues, however, that the objective standard should mirror that found in Rule 11, FRCP. In Hernandez' view, however, although Section 1915(d) and Rule 11 have similar and somewhat overlapping aims, the manner in which they are procedurally enforced is, or should be, mutually exclusive.

Rule 11 permits district courts, where violations of the Rule are found, to impose appropriate sanctions upon the violator. Like Section 1915(d), the central purpose of Rule 11 is to deter baseless filings in district courts. *Cooter & Gell* v. *Hartmarx Corp.*, 496 U.S. ——, 110 S.Ct. 2447, 110 L.Ed.2d 359, 374 (1990). The Advisory Committee's Notes to the 1983 amendment to Rule 11, however, disclose several reasons why *sua sponte* dismissals under Section 1915(d) cannot be procedurally justified by reference to the common goals of Rule 11. A Rule 11 violation finding will always follow the giving of prior notice to the alleged offender and an opportunity to that offender to defend his conduct.[30] In the case of pleadings, the issue "normally will be determined at the end of the litigation," at a time when the facts have been found after presentation of evidence. "The procedure obviously must comport with due process requirements."

[29] But see Hernandez' discussion in footnote 16, *supra*.

[30] Indeed, this concept seems to echo the rationale of Judge Wallace's concurring opinion below.

Advisory Committee Notes, *supra*. See also, generally, Comment Note—Procedural Requirements for Imposition of Sanctions Under Rule 11, Federal Rules of Civil Procedure, 100 A.L.R. Fed. 556 *et seq.*

The very purpose of Section 1915(d) dismissals, on the other hand, is to enable district courts to rid their dockets of frivolous cases at the onset of those cases without having to afford full due process procedures or factual or evidentiary hearings based on the presentation of evidence supporting (or not supporting) the pleadings.[31] Although the goal of discouraging frivolous litigation may be the same, the differences in procedural protections between Section 1915(d) and Rule 11 are so significant as to preclude the latter from forming a reasonable basis for the construction of the former. Moreover, controversy appears to exist with regard to the vigorous application of Rule 11 to cases filed by civil rights plaintiffs generally. See, e.g., 5A Wright & Miller, *Federal Practice & Procedure*, § 1332, pp. 33-35. That controversy should not be exacerbated by applying Rule 11 standards to a context in which Rule 11 procedural protections do not exist.

The United States argues that no reasonable lawyer would file a complaint involving implausible allegations, because of the risk of Rule 11 sanctions. Whether or not lawyers[32] would be deterred from filing complaints

[31] The United States points to the statutory term "satisfied" as constituting the measure of district courts' authority to determine frivolousness and thus dismiss cases pursuant to Section 1915(d). This reference simply begs the question of how a district court is to become "satisfied," whether by evidence or determination of factual irrationality, or solely on instinctive and *ad hoc* disbelief by individual district judges (or their staffs) of the alleged facts. Indeed, the Ninth Circuit's judicial notice standard may be viewed as an effort to set objective limits on the ephemeral concept of becoming "satisfied."

[32] Lawyers are moved by many motivations besides the possibility of Rule 11 sanctions, in deciding whether or not to take on particular cases. For example, lawyers frequently take cases on an hourly-rate basis which they would not consider taking on a contingent-fee basis. Rule 11 does not address these collateral types of motivations.

thereon, however, does not meet what Hernandez believes to be the more appropriate and proper question: would a financially solvent plaintiff, appearing *pro se*, be deterred from filing a complaint with implausible allegations? It is quite likely that a strongly opinionated *pro se* plaintiff[33] would not be deterred. And, as indicated by world events in 1991, infrequently but occasionally some very implausible things turn out to be true! Given that the intent of the *in forma pauperis* statute is to attempt to place poor persons into positions of relative equality with the rich, the deterrent effect upon the committed solvent plaintiff himself and not the deterrent effect upon a retained lawyer should be the measure by which Section 1915's promise of equal treatment is measured.

D. Judicial Efficiency.

Denials of motions to proceed *in forma pauperis* are appealable. *Roberts* v. *United States District Court*, 339 U.S. 844, 845 (1950). Dismissals of *forma pauperis* complaints are also appealable, as final judgments. 28 U.S.C. § 1291. Judicial efficiency will not be well served by creating "satellite litigation" over the question of whether particular allegations are frivolous as opposed to simply being unlikely. This Court must consider the efficiency of the entire judicial system, not just that of district courts:

> "While the premature dismissal of a suit may temporarily relieve some of the burdens on the district

[33] It also should not be assumed that the ability to pay a filing fee equates with the existence of sufficient assets to take a party out of the "judgment proof" category in terms of Rule 11 sanctions measured by significant attorneys' fees. To this extent, the threat of Rule 11 sanctions against a paying *pro se* plaintiff is substantionally the same as that threat against a *forma pauperis* plaintiff, i.e. minimal.

> courts, it also creates an ambiguous record which is destined to haunt both the appellate and trial courts for months—and perhaps years. . . . [R]esponsive pleadings might produce a more secure ground for disposition at the trial level and render useless any appeal."

Jones v. *Morris, supra*, 777 F.2d 1277, 1280-1281 (7th Cir. 1985); and see *Elliott* v. *Bronson*, 872 F.2d 20, 21 (2d Cir. 1989) (avoid "wasteful shuttling of the lawsuit between the district court and the appellate courts").

E. Standard of Review.

The United States as amicus has also challenged the propriety of the Ninth Circuit's review of the dismissals in these actions on a *de novo* basis. The United States asserts that both the statutory language of Section 1915(d) and this Court's language in *Boag* v. *MacDougall*, 454 U.S. 364, 365 n.* (1982) lead to the conclusion that dismissals under the statute are discretionary in nature, and should be reviewed under an "abuse of discretion" standard. Whatever may be the merits of that argument generally, however, it should not prevail *in this case*.

The language which provides that district courts "may" dismiss under Section 1915(d) is simply language of empowerment, and does not speak to the standards under which such dismissals are to occur. Similarly, the language which empowers such dismissals if the district court is "satisfied" that a complaint is frivolous represents no more than a description of the court having reached a conclusion, and does not speak to the manner in which that conclusion has been reached. See footnote 31 of this brief, *supra*.

Indeed, both the *Boag* holding and the very footnote cited by the United States support Herdandez' position in this matter. In *Boag* the Ninth Circuit had dismissed a prisoner's complaint as frivolous because it did not state

a claim upon which relief could be granted. *Nietzke*, of course, teaches that a failure to state a claim does not render a complaint frivolous. But this Court, in a *per curium* decision reversing the frivolousness dismissal, noted that prisoner Boag's complaint was sufficient to state a claim, and that "on the basis of the record before us, we cannot find a sufficient ground for affirming the dismissal of the complaint." *Id.* at 365. The majority declined to consider various matters which had not been considered by the lower court, even though judicial notice might properly have been taken of those matters had request therefor been made. *Id.* at footnote *. The Court expressly stated that "[a] question of that character [the effect of judicially noticeable non-disclosure of previous lawsuits] must be addressed in the first instance by the District Court." *Ibid.* The Court also articulated the desirability of an explanatory statement "by the District Court to facilitate intelligent appellate review." *Ibid.*

In the present matter, the Court of Appeals' vote necessary to create a majority for vacating the District Court's dismissals was based solely on procedural non-compliance by the District Court with established Ninth Circuit procedural case law. That case law requires district courts to advise *pro se* plaintiffs of the deficiencies in their complaints and to give them an opportunity to amend *in light of that advice*, before dismissing the complaints. In the Ninth Circuit, this obligation is not discretionary with district courts; it is mandatory, and it was not followed here. Accordingly, in these cases the Ninth Circuit did not apply an erroneous standard of review, regardless of whether an "abuse of discretion" standard should or should not normally apply to Section 1915(d) dismissals.[34]

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[34] Alternatively, even if the Court were to determine that the "abuse of discretion" standard espoused by the United States is appropriate in reviewing Section 1915(d) dismissals, this Court has also noted that a "district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law". *Cooter & Gell* v. *Hartmarx Corp., supra*, 496 U.S. at ——, 110 S.Ct. at ——, 110 L.Ed.2d at 382.

Because the United States has raised the general question, however, a response thereto is appropriate. In Hernandez' view, district courts have discretion to take or not take judicial notice of objectively ascertainable facts to assist them in determining whether specific allegations are or are not either irrational or objectively untrue. They also have discretion to determine whether a given set of factual allegations are rational or irrational. They do not, however, have discretion to make credibility determinations on the factual veracity of allegations concerning which contrary judicial notice is impermissible. Were it otherwise, Hernandez believes that a contrary result would have obtained in *Boag, supra.*

CONCLUSION

The judgment of the United States Court of Appeals for the Ninth Circuit, in *Hernandez II*, should be affirmed.

Respectfully submitted,

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